

BEFORE THE  
POSTAL RATE COMMISSION  
WASHINGTON, D.C. 20268-0001

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POSTAL RATE COMMISSION  
OFFICE OF THE SECRETARY

REVIEW OF SUNSET RULES

Docket No. RM2001-3

COMMENTS OF THE UNITED STATES POSTAL SERVICE IN RESPONSE TO  
ORDER NO 1319  
(August 21, 2001)

Order No. 1319 (July 18, 2001) invited interested persons to provide comments on the value of reissuing certain Commission rules of practice and procedure. The pertinent rules established the following specialized procedures or criteria for considering limited categories of changes in rates and classifications: 1) market response rate requests for Express Mail Service (39 C.F.R. §§ 3001.57-57c); 2) market tests of proposed mail classification changes (39 U.S.C. §§ 3001.161-166); 3) provisional service changes of limited duration (39 C.F.R. §§ 3001.171-176); 4) minor classification changes (39 C.F.R. §§ 3001.69-69c); and 5) multi-year test periods for new services (39 C.F.R. §§ 3001.181-182). Each of these sets of procedures has expired by virtue of five-year sunset provisions contained in the original rules<sup>1</sup>

As discussed below, the Postal Service believes that the rules that expired on May 7 of this year have continuing value and, at a minimum, should be reissued in their prior form. The Postal Service therefore supports the initiation of a rulemaking proceeding for that purpose. The Postal Service also submits that, in light of the

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<sup>1</sup> The Express Mail market response rules expired on March 6, 2000. The other rules expired on May 7, 2001.

experiences of applying those rules, and in light of the evolving economic and operational environments affecting postal rates and classifications, refinements and improvements in the previously adopted forms of these rules might also be considered in this rulemaking proceeding.

In addition, the Postal Service believes that the rules creating procedures for expedited review of Express Mail market response rate changes should be reissued, and are worth reconsidering, in light of current conditions and existing markets for expedited services of all kinds. In Order No. 1042 (Docket No. RM95-1, Feb. 17, 1995), which reissued Rules 57 – 57c after their first sunset expiration, the Commission noted an earlier observation in the rulemaking proceeding that originally created the Express Mail market response rules (Docket No. RM88-2). In that proceeding, the Commission mentioned the possibility of extending the applicability of the rules, “[i]f it later appears that similar procedures might be suitable for another class....”<sup>2</sup> While the Commission

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<sup>2</sup> 54 Fed. Reg. 11399 (March 20, 1989). In Order No. 1042, the Commission was addressing the argument advanced by United Parcel Service (UPS), in both Docket Nos. RM88-2 and RM95-1, that establishment of specialized rules for Express Mail would violate the prohibition against unreasonable discrimination or preference in 39 U.S.C. § 403(c). In both dockets, the Commission concluded that such discrimination would not be impermissible, *inter alia*, in light of the evidentiary record in Docket No. RM88-2, which showed that specialized procedures were justified for Express Mail, and in light of the absence of a similar showing for other categories of mail. Order No. 1042 also noted that the Commission had recently initiated Docket No. RM95-2 to consider the need for expedition and flexibility in its rules applied to other types of cases. See Notice, Docket No. RM95-2 (Dec. 14, 1994); Notice of Request for Comments on Information Contained in Postal Service Requests, Docket No. RM95-2 (March 15, 1995). While several parties filed comments in Docket No. RM95-2 (see, e.g., Response of the United States Postal Service to Request for Comments (Feb. 21, 1995)), the docket appears to have been overtaken by Docket No. RM95-4, which produced the other specialized procedures at issue in the instant proceeding. See footnote 3, below. The Commission’s suggestion that a rulemaking proceeding might

might conclude that exploration of this topic would be too controversial or too time consuming to entertain at this time in a rulemaking for the purpose of reissuing the other specialized procedures, the Postal Service believes that it is worthy of consideration at some point in the near future.

Finally, the Postal Service again notes that in Docket No. RM 95-4, which produced most of the rules at issue here, the Postal Service emphasized the desirability of procedural flexibility generally, and specifically the merits of rules that would accommodate additional innovations, such as rate bands and negotiated service agreements.<sup>3</sup> The Postal Service continues to believe that specialized procedures accommodating these and other measures of ratemaking flexibility would be worthwhile topics of a future rulemaking.

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be conducted to consider market response rate changes for other classes of mail appears not to have been pursued yet, and is worthy of consideration.

<sup>3</sup> Petition of the United States Postal Service to Initiate Rulemaking (dated April 10, 1995, filed April 13, 1995). As will be recalled, Docket No. RM 95-4 evolved from several sources: 1) the Institute for Public Administration's *Report to the Board of Governors of the United States Postal Service: The Ratemaking Process for the United States Postal Service* (Oct. 1991); 2) the report of the Joint Task Force on Postal Ratemaking, *Postal Ratemaking in a Time of Change* (June 1992); and 3) the rulemaking initiatives in Docket No. RM 91-1. In Docket No. RM91-1, the Commission's approach to the recommendations in the Joint Task Force *Report* focused on a comprehensive regime for general rate changes, which the Postal Service found problematic. See Comments of the United States Postal Service in Response to Notice of Proposed Rulemaking, Docket No. RM91-1 (Oct. 13, 1992). By contrast, the Postal Service emphasized the merit of pursuing Joint Task Force recommendations and suggestions involving, *inter alia*, market tests, provisional services, rate bands, and negotiated service agreements. See Comments of the United States Postal Service in Response to Order No. 926, Docket No. RM91-1, at 2-3 (June 24, 1992); Comments of the United States Postal Service in Response to Notice of Proposed Rulemaking, Docket No. RM91-1, at 5-6; Petition of the United States Postal Service to Initiate Rulemaking (filed April 13, 1995).

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**NEED FOR FLEXIBILITY**

In seeking comments in the instant docket, the Commission inquired whether the rules in question "have sufficient value to warrant reissuing them." Order No. 1319 at 5.

The Commission noted that "[t]he rules have been invoked sparingly or not at all," *id.*, alluding to the fact that the market test, provisional service, and minor classification procedures have each been employed once, and the multi-year test period provision has not yet been invoked. In this regard, the Postal Service notes that the one other *major advancement in procedural flexibility and expedition that has been incorporated* in the Commission's Rules of Practice and Procedure since 1971,<sup>4</sup> namely, the rules governing experimental mail classification proposals (39 C.F.R. §§ 3001.67- 67d), were used only once in the first fifteen years of their existence (Docket No. MC86-1), and then unsuccessfully from the Postal Service's perspective.<sup>5</sup> These rules were first employed to produce a moderately successful classification experiment in 1996 in Docket No. MC96-1.<sup>6</sup> Since that time, during the past five years, the experimental rules have been successfully utilized several more times.<sup>7</sup>

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<sup>4</sup> By and large, most of the amendments to the Commission's rules of procedure since postal reorganization have added to the Postal Service's filing, reporting, and documentation requirements in proceedings initiated to obtain recommendations on postal rate and classification changes.

<sup>5</sup> See Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission on the Destination-BMC Parcel Post Experiment, Docket No. MC86-1 (January 5, 1987).

<sup>6</sup> See Decision of the Governors of the United States Postal Service on the Recommended Decision of the Postal Rate Commission on the Experimental First-Class and Priority Mail Small Parcel Automation Rate Category, Docket No. MC96-1 (April 1, 1996).

<sup>7</sup> See PRC Op., MC97-1 (Experimental Nonletter-Size Business Reply Mail Categories and Fees); PRC Op., MC99-1 (Renewal of Experimental Classification and Fees for Weight-Averaged Nonletter-Size Business Reply Mail); PRC Op. MC2000-1

Furthermore, the fact that each of the three specialized procedures that expired this year were employed only once in five years does not establish that they lack value, or that they will not likely be used in the future. It must be noted that a number of other proceedings have been litigated during the same time period, including two omnibus rate proceedings (each of which involved multiple stages of Commission review), and several classification cases.<sup>8</sup> The circumstance that the specialized procedures have been invoked “sparingly” therefore reflects, at least in part, the relatively limited time available to pursue suitable proposals, as well as the appropriateness of the specialized procedures or the general rules, respectively, in each instance where the Postal Service has sought a recommended decision.

More generally, the pace of marketplace change has increased substantially since the Postal Reorganization Act first took effect. In this regard, the three specialized rule sets expand the options available to the Postal Service and the Commission in responding to the concomitant need for greater flexibility. In practice, the Commission has even recognized the value of building on this flexibility. For example, in the first Mailing Online case (PRC Docket No. MC98-1), the Commission accommodated the novel combination of two of the specialized procedures, market tests and experiments. This permitted a beneficial progression of product development that coexisted with, rather than was impeded by, the requirements of prior administrative review. In other words, Mailing Online was introduced as a new product

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(Experimental “Ride-Along” Classification Change for Periodicals); PRC Op., MC2000-2 (Mailing Online Experiment); and PRC Op., MC2001-1 (Experimental Presorted Priority Mail Rate Categories).

first as a market test. Later, it was expanded to a nationwide experiment. Ultimately, a permanently authorized service could emerge. The flexible employment of these procedural options, amid the uncertainty inherent in a fast changing marketplace, permitted information developed in one stage to inform later business and Commission decision making.

The need for flexibility and expedition in pursuing postal rate and classification changes has not diminished in the last decade, but rather it has grown substantially with the continuing evolution of the economic environment and the increasing competition for postal products. In its petition for a rulemaking in 1995, which led to the Docket No. RM95-4 specialized procedures at issue here, the Postal Service stated:

The United States Postal Service and its Governors believe strongly as a matter of policy that the current statutory and regulatory framework for changing postal rates and classifications needs to be more responsive to the business needs and public responsibilities of the Postal Service. We are firmly committed to seeking ways to make ratemaking more flexible and more effective in an increasingly competitive environment, either by employing the existing ratemaking scheme more productively, or, where necessary, by pursuing legislative change. It was with these objectives in mind that the Board of Governors of the Postal Service in 1991 commissioned the Institute of Public Administration (IPA) to assess the ratemaking process and to recommend improvement.<sup>9</sup>

Those conclusions and that position are just as valid today as they were six years ago.

Accordingly, the Postal Service believes the rules that have expired partially fill a continuing need for flexibility, and that the frequency of their usage should not be the measure of their future value. Even though employed only once (or, in the case of

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<sup>8</sup> Docket Nos. R97-1, R2000-1, MC96-2, MC96-3, MC97-1, MC97-3, MC97-4, MC99-1, MC99-2, MC2000-1, MC2000-2, and MC2001-1.

<sup>9</sup> Petition of the United States Postal Service to Initiate Rulemaking, at 1 (filed April 13, 1995).

multi-year test periods, not at all), they have been useful, although each experience with the rules has also amplified certain deficiencies, which could justify refinements. Below, we discuss briefly some of the positive elements of each of these experiences.

### **MARKET TESTS**

The market test rules (39 C.F.R. §§ 3001.161-166) were invoked successfully to launch Mailing Online in Docket No. MC98-1. Prior to that time, the Postal Service had been offering Mailing Online as an operational test. The market test permitted the Postal Service to begin charging fees for the conversion of electronic messages into physical mail. Only a few customers in specific geographic areas were permitted to use the service, a reflection of the limited nature of a market test.

Mailing Online stands as a good example of the benefits of procedural and substantive flexibility. The Commission recommended the market test in less than the 90 days contemplated by the rules, enabling a relatively rapid entry into the marketplace. The Postal Service promptly implemented the market test, and it continued for a year. Mailing Online was originally conceived as a stand-alone service, and the testimony submitted reflected this approach. As Postal Service ideas on how best to use the Internet evolved, Mailing Online became part of what was known as Post Office Online, and new costing testimony was submitted based on that infrastructure. Furthermore, Postal Service decision-making on the strategic advantages of the Internet continued to evolve into a standardization of the Postal Service presence on the Internet through a single primary web site, USPS.com. This additional change to the infrastructure supporting Mailing Online, together with problems observed in offering Mailing Online during the market test, ultimately led the

Board of Governors to withdraw its request for authorization to offer Mailing Online as an experiment. In Docket No. MC2000-2, however, a new request to conduct a Mailing Online experiment was filed, and it is in operation today.

On balance, the options afforded by the specialized procedures played a positive role in these developments. Not only did the promise of expedition and flexibility afforded by the rules encourage Postal Service decision-making internally, the creative and liberal responses to the evolving Mailing Online service within the framework of the rules accommodated change in a fast-moving environment. While the Postal Service naturally would prefer even more freedom, the existence of the specialized procedures was a marked advance over the more limited procedures available before the new rules were created.

### **PROVISIONAL SERVICES**

The provisional service rules (39 CFR §§ 3001.171 *et seq.*) are designed to facilitate expeditious consideration of proposals for new products that supplement, but do not alter, existing services for a period of limited duration. They were invoked in July 1997, when the Postal Service asked the Commission to recommend a classification and fee schedule for a packaging service. The proposal was designed to enable postal customers to present unwrapped, mailable items to be packaged and staged for dispatch by the Postal Service. The Postal Service proposed it as an acceptance alternative for parcel mailers for a two- to three-year "provisional" period.

The Commission held hearings on the proposal, and several organizations, including a coalition of retailers in the mail and parcel industry, actively participated in the proceeding. In March 1998, after full consideration of the information supplied by



the Postal Service and other participants, the Commission recommended a provisional packaging service with some modifications, and with substantially higher fees than had been proposed. The Commission's recommendations were transmitted to the Governors of the Postal Service for their consideration.

The promise of procedural flexibility and expedition embodied in the provisional service rules encouraged the Postal Service to move forward with its packaging service proposal. In this principal respect, it could be argued that the procedures fundamentally failed, since the proceeding lasted eight months, much longer than the rules anticipate. Both the Commission and the Postal Service recognize, however, that during that time the Commission bore the heavy responsibility of simultaneously presiding over the litigation of an omnibus rate case. This clearly affected the Commission's ability to return a recommended decision within the 90-day period contemplated by the provisional service rules.<sup>10</sup>

Nevertheless, while the terms of the recommended packaging service were not as favorable as the Postal Service had proposed, the proceeding did clear the way for

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<sup>10</sup> Indeed, the Presiding Officer acknowledged the difficulties posed by the pendency of the two dockets:

The fact is that we are facing an unusual and difficult situation. This docket is going forward parallel to the omnibus rate case. Having two significant case proceedings at the same time will not be easy for the Commission or for the participants involved in those cases. And I've chosen to act as presiding officer in both cases in part because this will simplify coordination of the two cases. I'm committed to conducting both dockets efficiently, and as required by the statute as expeditiously as is consistent with procedural fairness. The existence of R97-1 is a reality. We will have to build our hearing schedule around the schedule established for that case.

the Postal Service to introduce it as a new product. Ultimately, the Governors chose not to act on the Commission's Recommended Decision, but the docket is regarded at least as a partial success in the first application of the Commission's provisional service rules. In this regard, the Postal Service remains optimistic that, under more favorable conditions, the provisional service specialized procedures will fulfill their objective of providing an expedited, simplified means for considering supplemental service initiatives.

### **MINOR CLASSIFICATION CHANGES**

The Postal Service requested an enhancement of the existing Bulk Parcel Return Service (BPRS) in Docket No. MC99-4. The Postal Service's Request was filed as an expedited "minor classification case" under 39 C.F.R. §§ 3001.69-69c, which simplified, to some extent, the process of preparing the filing. The proposed refinement sought to improve service to customers and to increase postal efficiency by expanding options within BPRS in two ways. First, the Request sought to expand eligibility for BPRS to otherwise eligible parcels which have been opened, resealed and redeposited in the mail by the recipient, when it is not practicable or efficient for the Postal Service to seek payment of return postage from the recipient. Second, the request sought to allow mailers to furnish recipients with a label specifically authorizing return of the opened parcel to the original mailer as BPRS.

Under the umbrella of the already abbreviated schedule afforded by the specialized procedures, the Postal Service was able to conclude a settlement agreement among the interested parties. That agreement was submitted to the

Commission and formed the basis for its recommendation of the classification change. As a result of the expeditious procedures and the cooperation of the parties reaching settlement, not only was the Commission able to issue a recommended decision within the 90 days from the filing of the Request, as contemplated by the rules, but the Governors were also able to implement the enhancement within that period.

It could be argued that the same result might have been reached through a combination of waivers and settlement efforts under procedures applying to classification changes in general (Rules 54 and 64). As with Mailing Online and the packaging service, however, the availability of the more liberal specialized procedures for minor classification changes contributed to a favorable environment for innovation, decision-making, and settlement, and had a positive effect on the advancement of the proposal. Like the experiences with market tests and provisional services, moreover, as a first application of the minor classification procedures, the BPRS change supports retention of the specialized procedures.

### **MULTI-YEAR TEST PERIODS**

In proposing and adopting a rule that would accommodate multi-year test periods in Docket No. RM95-4, the Commission agreed with the conclusions reached by the Joint Task Force that multi-year test periods would be useful for new services that require substantial introductory costs that would not be recovered during the start-up period of the service. A multi-year test period would allow new services an opportunity

to mature and achieve financial breakeven over a more representative period.<sup>11</sup>

Nothing has happened to change that assessment, and the Postal Service believes that this basis for multi-year test periods in appropriate circumstances applies at least as strongly now.

While the Postal Service has not yet used the rules allowing multi-year test periods, it has not rejected their use. In fact, the Postal Service has been gaining experience with new services incurring substantial start-up costs, such as Mailing Online. For Mailing Online, the Commission attributed start-up costs to be recovered during the period of the experiment, even when there was evidence that the start-up costs would provide benefits beyond the end of the experimental period. PRC Op., MC2000-2, at 51-52. In this regard, the Postal Service reaffirms a need for the multi-year test period rules, so that costs can be recovered over an appropriate period.

Not only do we assert that the reasons supporting multi-year test periods remain valid for nascent services, but the Postal Service would like to reopen for consideration the possibility of a rule that would accommodate alternative test periods in all Commission proceedings conducted pursuant to 39 U.S.C. §§ 3622 and 3623. While this proposal has been advanced a number of times since postal reorganization, it was proposed early in the rulemaking efforts that followed the issuance of the Joint Task Force *Report*, which evolved into the specialized procedures under consideration here. In Docket No. RM91-1, the Postal Service suggested a rule providing for multi-year test periods, as an alternative to the Commission's proposed "two-by-four" comprehensive

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<sup>11</sup> See Notice of Proposed Rulemaking, Docket No. RM95-4, 60 Fed. Reg. 54981 (Oct. 27, 1995); Order Adopting Final Rules, Order No. 1110, Docket No. RM95-4, at 19-21

ratemaking regime, which was to govern general and other rate changes<sup>12</sup> The Postal Service explained that a simple amendment to the existing test year provision in the Commission's rules would overcome the Postal Service's and the Governors' principal objections to the Commission's proposal, while affording considerable flexibility. Among other benefits, a clear accommodation of multi-year test periods, without the need for unpredictable waivers of existing rules, would facilitate general rate change proposals based on phased and staggered rate schedules over a predetermined rate cycle. The Postal Service stated:

The Postal Service should also have the option, on a case-by-case basis, to specify subclasses and categories for which it would receive Commission recommendations for staggered (phased) rate increases over the course of the cycle selected. Contribution expectations for certain subclasses could be met through a combination of rate increases scheduled both earlier and later during the course of the cycle. Obviously, staggered increases would be more attractive when a relatively longer cycle was specified. All types of rate increases contemplated for the entire cycle, i.e., both single and staggered changes, would be included within one Commission recommended decision transmitted to the Governors for their consideration following one ten-month proceeding.<sup>13</sup>

Unfortunately, at that time, the Commission rejected consideration of the Postal Service's proposal, largely since it was not compatible with its notions of a more structured, less flexible framework for regular rate changes. The Commission stated:

If the specified regular rate cycle is removed, the linchpin of the intended improvements in the ratemaking process is missing, and our proposed rules will not function. For this reason, the Postal Service counter-proposal of a multi-year test period of indefinite length, to be determined by the Board of Governors on a case-by-case basis, is not an acceptable

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(May 7, 1996).

<sup>12</sup> See Comments of the United States Postal Service in Response to Notice of Proposed Rulemaking, Docket No. RM91-1, at 5 and Attachment 1 (Oct. 13, 1992).

<sup>13</sup> *Id.* at Attachment 1, at 2.

revision of our proposed rules.<sup>14</sup>

While the Postal Service understands the Commission's leaning against such freedom in the context of its earlier proposal in Docket No. RM91-1, it suggests that perhaps the time has come to reconsider and acknowledge the need for this added flexibility in its rules.

### **RULES FOR EXPEDITED SERVICES**

Although the Postal Service did not file a Request under the Commission's rules for market response rate changes for Express Mail Service when those rules were in effect, the Postal Service continues to believe that such rules have potential utility. In the current circumstances, the Postal Service would prefer that former rules 57 through 57(c) be renewed, and possibly refined and expanded to include other classifications within the market for expedited services.

A number of factors have influenced the Postal Service's determination to utilize or not utilize the Express Mail market response rules in the past. Among these have been the extent of price competition in the overnight delivery market, intensification of competition in the expedited delivery market for services other than overnight delivery, and limitations of litigation resources amidst an increasing caseload before the Commission. As the Postal Service has noted on prior occasions when the Express Mail market response rules have been considered, the Postal Service also has concerns regarding certain shortcomings of those rules. See, e.g., Comments of the United States Postal Service on the Commission's Proposed Rules, Docket No. RM88-

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<sup>14</sup> Order Withdrawing Proposed Rules and Soliciting Further Comments, Order No. 968, Docket No. RM91-1, at 4 (March 19, 1993).

2 (May 1, 1989). Despite these factors, the prior rules have offered potential flexibility currently lacking in the standard ratemaking regime, and would cost virtually nothing to revive. For this reason, the Postal Service requests that the Express Mail Service market response rules be re-enacted. The Postal Service further suggests that, if the Commission is disposed to conduct a more comprehensive review of the rules, the Commission also should consider ways in which the market response rules could be made more useful, and how they might be applied to other services facing market pressures similar to Express Mail.

### CONCLUSION

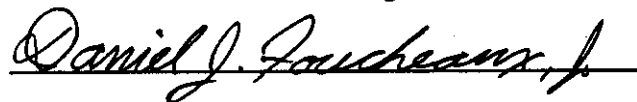
For the above reasons, the Postal Service submits that the Commission should undertake to reissue the rules in question, and, if feasible in the context of the instant proceeding, to refine them appropriately to provide even more flexibility in the ratemaking process.

Respectfully submitted,

UNITED STATES POSTAL SERVICE

By its attorneys:

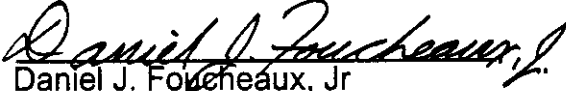
Daniel J. Foucheaux, Jr.  
Chief Counsel, Ratemaking

A handwritten signature in cursive script, reading "Daniel J. Foucheaux, Jr.", written over a horizontal line.

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## CERTIFICATE OF SERVICE

I hereby certify that I have attached a copy of this Motion to all copies of the Request being distributed to parties upon notice of their intervention in this proceeding.

  
Daniel J. Fouchaux, Jr

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